Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

NIESCHLAG & CO., INC.,
Petitioner,

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

Brief in Support of Petition for Certiorari.

Reference has been made in the petition to jurisdictional provisions, the proceedings and opinions below, the questions and conflicts presented, and the grounds for review.

Summary of Conflicting Evidence as to Surrounding Circumstances, Facts and Intent; Defendant's Suppressions of Evidence Thereof and of Witnesses; and the Admissions and Issues Made But Ignored by the Court.

After previously moving without success (see Opinion of Knox, *D. J.*, R., pp. 155-157) to eliminate much of the significant surrounding facts and circumstances by striking certain allegations (pars. 23, 24, 25, 40, 45, 49 and parts of paragraphs 46 and 47) from plaintiff's verified complaint, defendant filed an unverified amended answer, and moved simultaneously for summary judgment.

In support of its summary judgment motion, defendant submitted affidavits of Bogardus, Craig and Smith, who were Vice-Presidents, and Bedell and Leyshon, employees of defendant; all accordingly interested witnesses. Defendant did not submit any affidavits of its underwriters Brust and Thurnall (cf. *Equitable Life Ins. Co.* v. *Halsey Stuart & Co.*, 312 U. S. 410, 426; *Runkle* v. *Burnham*, 153 U. S. 216, 225; *Interstate Circuit* v. *U. S.*, 306 U. S. 208, 226, and cases cited); and the motion evinced a continued tactical purpose of defendant to suppress surrounding facts and circumstances, and witnesses, and to induce rendition of judgment without consideration thereof.

Bogardus' affidavit (ff. 285-287) related only to the Seventh Defense (f. 262) of Garcia's alleged premium default, withdrawn as noted in the Petition (p. 3).* Craig's affidavit (ff. 290-293) merely repleads by reference the omnibus reclamation proceedings order. And no independent proof on its defenses as to the alleged reason for the non-delivery or the alleged lack of insurable interest was offered.

Bedell and Leyshon were inspectors, whose affidavits (ff. 317-321, 323-327) purport only to cover "the only inspections which I made" (ff. 321, 327), which were in March and April, 1939 (ff. 318-320, 324-325), with none at the time of or subsequent to the bankruptcy.

Smith's affidavit (ff. 296-315) alone purports to cover any of the negotiations between defendant and Garcia Sugars Corporation or its brokers for the insurances. It purports to cover negotiations in which *Smith* took part and is "competent to testify to" (ff. 296, *et seq.*; cf. Rule 56[e])—presenting, in absence of any affidavits then or later by Brust and Thurnall, serious ground for hold-

*Defendant withdrew this defense on oral argument in District Court as not affecting plaintiff's rights and has agreed this withdrawal applies, and will be conceded, throughout appellate proceedings.

ing Smith's affidavit was "presented in bad faith" (Rule 56[g]; cf. *Equitable Life Ins. Co.* v. *Halsey Stuart & Co., supra; Runkle* v. *Burnham,* 153 U. S. 216, 225; *Interstate Circuit* v. *U. S.,* 306 U. S. 208, 226 and cases cited).

Plaintiff submitted affidavits by its president, Nieschlag (ff. 341-354); its treasurer, Kocher (ff. 356-365); two of the Garcia Company's brokers, Benfield (ff. 368-390) and Skillman (ff. 392-410); the former secretary and treasurer of the warehouse corporation, McMackin (ff. 413-417); and the secretary of the New York Cocoa Exchange, Cross (ff. 419-426). Those of Nieschlag, Kocher and Cross make clear plaintiff's genuine risks, the latter showing that in addition to the $216,200 advances made, petitioner as an Exchange member was bound for specific performance of delivery (f. 422) under the Exchange contracts for September delivery sales shown by Nieschlag (ff. 349-352). Nieschlag and Kocher make clear plaintiff's insistence to the Garcia Company throughout on insurance of non-delivery risk or "non-performance by the warehouseman of the delivery obligation" (f. 358), and on "plaintiff's being fully insured against all conceivable warehouse risks" (f. 346); and their understanding that by the final form of negotiable insurances tendered and accepted "plaintiff was insured specifically by the defendant of the future delivery by Harbor Stores Corporation, on demand, of the quantities of cocoa specified" (f. 347). McMackin established that the warehouse receipts were duly signed by proper officers and issued by the warehouse company (ff. 414-415).

For any details of the negotiations between Garcia's brokers and defendant, in which plaintiff was not represented and had no part, plaintiff had perforce to rely on affidavits of Garcia's brokers, Skillman and Benfield. In Winter on Marine Insurance (2d. Ed.) p. 375, defendant's president shows how closely such brokers' interest

is with defendant. Their affidavits here for plaintiff, who was not even their customer, are despite adverse interest.

Comparing the pictures shown, Vice-President Smith, who Benfield discloses was defendant's senior underwriter (f. 377), insinuates that *he* handled all the insurances. He recites issuances of the first lot of six March 20, 1939 certificates, and the first supplementing "endorsements to the above certificates" on March 24, 1939 (ff. 298-300), insinuating but not asserting he took part therein. Actually, both were handled by junior underwriter *Brust* with *Skillman*. Most significantly, prior negotiable insurances describing the same quantities of beans were still secretly outstanding pledged together (as defendant admits was Garcia's custom) with warehouse receipts, to others of Garcia's creditors; and *Brust* realized those being issued constituted but were not marked as duplicating insurances, and he obtained "lost policy" release indemnities from Garcia (Skillman, ff. 395-397). Smith mentions neither Brust, Skillman, duplicating insurances nor "lost policy" releases, and the Court ignores all such suppressed facts.

Smith then recites "a representative of the broker again called at the office of defendant and requested a further extension of the coverage" and what allegedly "The broker advised *deponent*" and *Smith* told "the broker" in this and another conference next day (ff. 300-304). He does not mention that first Skillman conferred again with *Brust* and with *Thurnall* (Skillman, ff. 399-400), nor Smith's own conference with *Skillman* and *Thurnall* (Skillman, f. 402). Actually, as with the prior insurances, Skillman applied for the non-delivery insurances to Brust—*who refused to underwrite it* (f. 399); then Skillman applied to Brust's superior Manager Thurnall, *who refused to underwrite it* (ff. 400-401); then Skillman and Thurnall talked to Smith, *who refused to*

sign the insurances, which Skillman on return to the broker's office told his superior Benfield (ff. 402-403). *Then* Benfield "decided to take the matter up, myself, direct" with Smith, and interviewed him on that and the next day (ff. 377-380). These facts Smith suppressed; and the Court ignored.

Smith states "I then advised the broker that *we* would make a *physical* inspection of the *beans* and if their condition was sound, the company would grant the extended coverage at an additional premium" (f. 304). He does not mention, but plaintiff's proof establishes that at first to both Skillman and Benfield in turn Smith demanded a "complete inspection" to "be made by independent inspectors, to be paid for by Garcia Sugars Corporation" (Benfield, f. 383; Skillman, ff. 402-403); that subsequently he voluntarily waived this; that he was more concerned with the fear of losing Garcia's insurance business than with taking the "complete inspection" precautions he realized were advisable; that he did not consent to underwrite the "non-delivery" risk until after Benfield told him that plaintiff's insistence was such that he feared that if defendant did not underwrite it for Garcia it must be procured elsewhere and defendant and the broker "would both lose the business" (ff. 378-379); that the duplicating insurances for which the "lost policy" release indemnities had been required were still outstanding, evincing a prior title claim of other creditor-pledgees thereof; that from this defendant well knew but suppressed from plaintiff that the "non-delivery" risk insured thus constituted at outset peculiarly a duty or obligation liability risk, to which as such defendant must have intended the special "non-delivery" insurances to attach; and that the premium charged accordingly was 5¢ per cent. per month (Skillman, f. 403; Benfield, f. 380). These facts Smith suppressed and the Court ignored.

Smith further states that "In connection with the issuance of the subsequent certificates sued upon herein, which contained the same broad coverage * * * I insisted" upon a physical inspection (f. 306). Actually these subsequent insurances were handled by Skillman with *Brust* and *Thurnall* (Skillman, ff. 405, 407) who give no affidavits; and they also involved duplicating insurances still outstanding, and defendant's taking "lost policy" release indemnities from Garcia (Skillman, ff. 406, 408-409); all of which Smith suppresses. The Court ignores such suppressed facts.

Smith's really sly statement that defendant at no time was "advised that warehouse receipts had been issued" and "*No mention* was ever made of warehouse receipts and no warehouse receipts were ever submitted to defendant" (ff. 307-308) thus *insinuates* but does not state that they were not contemplated by defendant. There is no affidavit from Brust or Thurnall as to this, nor as to whether *they* knew of or discussed or considered or saw warehouse receipts. And Smith's *insinuation* is belied both by the explanation in President WINTER's book that descriptions in negotiable certificates are designed to "fit the description" in "corresponding" bills of lading—or here, warehouse receipts—which together form part of "a commercial set" of documents (WINTER, MARINE INSURANCE, 2d Ed., pp. 133, 48), and by the admissions in the Amended Answer that the descriptions were identical, and that defendant knew the Garcia Company borrowed on companion warehouse receipts and insurance certificates (Comp., par. 41, f. 62, undenied). Moreover, since the "non-delivery" insurances were by dated special provisions effective forthwith, and in view of the "lost policy" release indemnities covering outstanding prior insurances; unless defendant contemplated warehouse receipts it must have contemplated an

even less formal medium of delivery claim, such as any form of delivery order whatever, with the risk as insured consequently intended as one still more broadly underwriting the warehouseman's or Garcia Company's obligation, credit or liability.

Skillman states that after the risk ultimately was first approved "Mr. Brust told me he would make up new coverage endorsements" (f. 404)—directly contrary to Smith's insinuation (f. 301) and the Court's holding (f. 450), without any affidavit from Brust, that defendant was not their author (cf. *contra, Bushey & Sons* v. *American Ins. Co.*, 237 N. Y. 24, 29).

Defendant at first was unwilling to insure any other risks than the perils of fire, lightning and sprinkler leakage only; and the first set of six certificates, dated March 20, 1939 (R., p. 61), covered only these perils, certified as having been made by endorsement to an open policy, No. CP37396 and effective March 17, 1939. *Plaintiff rejected these certificates* (Comp., par. 23, f. 37; Amended Answ., par. 8, f. 231). The Garcia Company then procured the March 24th forms of "endorsement" instruments to be attached to the *certificates*, by which defendant agreed "to also insure" from date certain additional risks (Comp., par. 24, f. 38; undenied). On retender of the certificates, together with these supplemental "endorsements" thereof, *plaintiff rejected these* (Comp., par. 25, f. 39; Amended Answ., par. 8, f. 231) upon the specific ground, among other things, that the risk of "non-delivery" default by the warehouseman was not insured against. Thereupon, the Garcia Company, through its brokers, again approached defendant for a *third time* and after negotiations with three successive underwriters, Brust, Thurnall and Smith (noted *supra*, pp. 27-28), procured the issuance by defendant (Comp., par. 26, f. 40; undenied) of the six March 30 instru-

ments of "endorsement" which recited they were to be attached to "*special* policy No. C. P. 37396/*NW9764*" (and the other numbers corresponding to those of the other *certificates* of March 20, 1939); and these by specially added clauses provided (R., p. 65):

> "* * * *it is hereby agreed* that *effective March 30, 1939,* this insurance *is* extended * * * *also to insure,* notwithstanding any exclusion in said endorsement, damage by * * * non-delivery, * * *." (Italics ours.)

Of the remaining ten certificates, issued later, eight dated April 5, 1939 and two dated April 14, 1939, certified first endorsements of insurance made on the policy on April 4, and April 11, 1939 covering risks of fire, lightning and sprinkler leakage, and then set forth by specially added clause, as of April 5 and April 14, 1939, that (R., pp. 69, 73):

> "This insurance *is* extended * * * *also to insure* notwithstanding any exclusion in said endorsement, damage by * * * non-delivery;" (Italics ours.)

The Garcia Company's *policy* No. 37396 contains a printed clause which "excludes" the risk of non-delivery unless "otherwise" and "specially" provided for "herein" (R., p. 47), *i. e.,* unless "specially" provided in the policy. "Exclude" means "To shut out; to hinder from entrance or admission * * * to keep out what is already outside;" (Webster's New International Dictionary). This clause obviously was designed by WINTER, not to fix the meaning of "non-delivery" as being already controlled by the policy, as held below (f. 443), but to prevent its ever being underwritten except after special

attention and by independent special clause, with or without limitation as specially provided in each case.

Defendant expressly admits that it had been informed and knew and understood that the insurances sued on "had been demanded by plaintiff as a condition" to financing the Garcia Company (Amended Answ., par. 14, ff. 237-238); that defendant issued them "voluntarily and without any inducement from plaintiff" (par. 16, f. 239), that "it did not rely on any representations made by the plaintiff or any agent or representative of the plaintiff" (par. 13, f. 237), and that the descriptions in the insurance contracts herein were the same as those in the warehouse receipts (par. 19, ff. 240-241).

There is no denial that on March 18, 1939, April 4, 1939, April 12, 1939 and May 16, 1939, respectively, plaintiff both made advances to Garcia Sugars Corporation, totalling $216,200, and executed for its account contracts with other third parties binding plaintiff for sale for September delivery, under the Rules of the New York Cocoa Exchange, of cocoa beans equal in tonnage to 47,480 bags (Comp., par. 11, f. 20, undenied); that Garcia Sugars Corporation, on such dates duly endorsed and delivered to plaintiff for value the ten negotiable or "order" warehouse receipts of Harbor Stores Corporation, certifying its receipt and covenanting to make delivery to order of 47,480 bags of cocoa beans (Comp., par. 16, f. 24, undenied; Exhs. B-1 to B-10, R., pp. 35-45); and on March 30, 1939, April 5, 1939, April 14, 1939 and May 16, 1939, respectively, duly endorsed and delivered to plaintiff for value the sixteen negotiable or "order" insurance contracts in suit issued by defendant (Comp., pars. 28, 32, 37, ff. 42, 46, 54, undenied; Exhs. D-1 to D-6, E-1 to E-6 and F-1 to F-10, R., pp. 61-75); that on May 24, 1939, plaintiff was and is owner and holder for value of the contracts of insurance in suit (Comp., par. 7, f. 14; Amended Answ., par. 3, f. 227); that on

May 24, 1939, plaintiff duly demanded delivery of said 47,480 bags of cocoa beans from Harbor Stores Corporation, which failed and refused to make delivery, is unable to make delivery, has been adjudged bankrupt, and is unable to pay plaintiff its damages, and that Garcia Sugars Corporation has been adjudged bankrupt (Comp., pars. 50, 51, 52, ff. 72, 73 undenied).

POINT I.

The court erred in the construction and effect given to the bankruptcy reclamation proceedings order.

The court held the reclamation proceeding order "adjudicated that plaintiff did not own the beans and was not entitled to possession of them" and that "it must be held plaintiff did not have any insurable interest therein" (f. 440). It treated the question thereafter as whether the insurances gave "protection against non-delivery of goods in which it did not have any insurable interest" (ff. 441-442).

Actually, the order merely adjudged as to reclamation rights broadly respecting such residue of beans as remained in the warehouse "on the 29th day of May, 1939, the date when the above named bankrupt was duly adjudicated as such, or at any time thereafter" (f. 277). In *Little, et al.* v. *General Ins. Co.*, decided May 7, 1942, Hulbert, *D. J.*, S. D. N. Y., quoted and disapproved the above ruling of Judge Bondy and held: "I do not so interpret the determination of the Referee in Bankruptcy * * *." He held the corresponding order dismissing the *Little* reclamation claim related only to sugar "now in the possession, custody or control of the trustees in bankruptcy", etc.

An adjudication thus pleaded collaterally which did not purport to decide the questions raised in the suit in which pleaded is neither decisive of nor pertinent to such questions, and cannot be given an effect beyond the points actually adjudicated (*Ocean Accident & Guarantee Corp.* v. *Old Nat. Bk.*, C. C. A. 6, 4 F. [2d] 753, 755; *Schreiner* v. *High Court of I. C. C. of F.*, 35 Ill. App. 576; *Donohue* v. *Vosper*, 243 U. S. 59, 65; *Russell* v. *Place*, 94 U. S. 606, 608, 610).

Application of descriptive provisions of written instruments "to external objects described therein is the peculiar province of the jury" (*Richardson* v. *City of Boston*, 19 How. [60 U. S.] 263, 270; *McNamee* v. *Hunt*, C. C. A. 4, 87 F. 298, 301). If, therefore, the "non-delivery" insurances could properly be held to be insurances of "external objects", *i. e.*, beans, as such, and if defendant had offered any evidence purporting to associate the insurances with beans still in the warehouse on May 29, 1939, and affected by the reclamation order, there still would have been a question of fact as to this being the proper application of the descriptive provisions of both the insurances and the warehouse receipts. But as no such evidence was offered, there was no basis, even on defendant's theory of the insurances, to treat the reclamation order as in any way relevant, beyond merely further confirming as absolute the "non-delivery" which had occurred May 24th.

Claims in reclamation proceedings and orders made therein are different, arising under different sections of the Bankruptcy Laws, from proofs of claims for debts, liabilities or damage (such as this plaintiff's claim for "non-delivery" damage), and neither adjudicate nor bar nor affect the latter nor the claimant's indemnity rights against third parties (*Thomas* v. *Taggart*, 209 U. S. 385; *In re Ross*, D. C. S. D. Tex., 39 F. [2d] 242; *In re Kaplan*

v. *Myers,* C. C. A. 3, 241 Fed. 459; *Karns* v. *Thomson & McKinnon,* D. C. D. Minn., 3rd Div., 22 F. Supp. 442, app. Dism'd C. C. A. 8, 102 F. [2d] 993; *Rankin* v. *Tygard,* C. C. A. 8, 198 F. 795; *Poswick* v. *Cutten,* 258 N. Y. App. Div. 218, aff'd 283 N. Y. 660).

Armour v. *Michigan Central R. R. Co.,* 65 N. Y. 111, and *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. (2d) 493, are closely in point as refuting the defense fundamentally. In the *Armour* case a judgment of replevin obtained by a third party was held to constitute no defense to an action against a carrier for "non-delivery" damage. The *National Bank of Tacoma* case held that "lack of delivery" indemnity insurance, issued under circumstances closely analogous to what defendant claims here, protected a bank against lack of delivery even after proof that the materials described and even the "order" recited as pledged in fact never had existed.

POINT II.

Contrary to Rules 56, 38, 39 and the Seventh Amendment, the court substituted itself for the jury, determined issues depending on credibility of witnesses, effect and weight of evidence and contractual intent, ignored defendant's suppression of facts and witnesses, and ignored and failed to treat petitioner's opposing papers as proving the facts, circumstances and intent shown therein.

Petitioner's cross-motion did not waive its opposition to defendant's motion, nor its right to jury trial; and the evidence either entitles petitioner to judgment as matter of law or requires trial by jury.

The Court obviously treated the case as having been submitted to it for final determination "on the pleadings and affidavits" (f. 437), with any right waived to have a

jury determine disputed or conflicting facts, the credibility of witnesses, and the intent of the parties. This is contrary to *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389; and to Rules 56, 38 and 39, and the Seventh Amendment, and constitutes both a grave injustice to plaintiff and a dangerous precedent.

Smith was a doubly interested witness whose statements, before being adopted, "should have been submitted to the jury" (*Brooks* v. *People's Bank,* 233 N. Y. 87, 94). The picture he painted was completely refuted and, with respect to defendant's motion, petitioner was entitled, before any judgment could be rendered for defendant, to have a jury determine the issues of fact as to the surrounding circumstances and intent.

Petitioner, as the "opposing party", was entitled to have all *its* evidence treated as proving all that it reasonably may be found sufficient to establish, to have drawn in its favor all inferences fairly deducible from its own evidence, to have all countervailing evidence of defendant disregarded by the Court, and to have all issues that depend on the credibility of witnesses and the effect or weight of evidence decided by a jury (*Gunning* v. *Cooley,* 281 U. S. 90, 94; *E. K. Wood Lumber Co.* v. *Andersen,* C. C. A. 9, 81 F. [2d] 161, 166, cert. denied; 297 U. S. 723).

Defendant does not contend that petitioner had no insurable interest in the risk of non-delivery, which it was fully entitled to protect by *indemnity* insurance (*Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. [2d] 493), with this defendant (*Great Lakes Transit Corp.* v. *Interstate Steamship Co.,* 301 U. S. 646, 652, 653). Defendant contends only it did not insure, nor intend to insure, such risk of "non-delivery".

This contention, the first cornerstone of defense, is one as to intent and meaning, and under the rule ap-

plicable "particularly to insurance cases" (*Union Trust Co.* v. *Whiton,* 97 N. Y. 172, 173), petitioner was entitled to have the questions of intent, purpose and meaning of the particular words used treated as questions of fact for the jury (*Wood* v. *Guarantee Trust & Safe Deposit Co.,* 128 U. S. 416, 424; *Pitney* v. *Glens Falls Ins. Co.,* 65 N. Y. 6, 17; *U. S. Rubber Co.* v. *Silverstein,* 229 N. Y. 168, 171; *Utica City Nat. Bank* v. *Gunn,* 222 N. Y. 204, 208; *Kavanaugh* v. *Kavanaugh Knitting Mills,* 226 N. Y. 185, 198; *Piedmont Hotel* v. *Nettleton Co.,* 263 N. Y. 25, reversing a summary judgment; *Rosenkranz* v. *Schreiber Brewing Co.,* 287 N. Y. 322, 325; *Rey* v. *Simpson,* 22 How. [63 U. S.] 341, 347).

The Court had no right to substitute itself for the jury, pass upon the effect of the evidence, find (or eliminate by ignoring) the facts involved in the issue and render judgment thereon; but "That is what was done in the present case" (*Baylis* v. *Travellers Ins. Co.,* 113 U. S. 316, 320-321).

The peculiar aptness of the foregoing authorities is shown by the fact that the decision below is assertedly based on "surrounding circumstances", and undertakes to assign to the "non-delivery" insurances a meaning peculiar to the case, as according to "circumstances" which the court selects to recite. But the Court selected and recited as the only facts considered by it the matters asserted or denied in defendant's moving papers. Repeatedly, a specific intent is assertedly deduced, or rejected as not following, from some assertion or denial by defendant (ff. 441, 444, 445, 446, 447, 448, 449, 450).

As well shown by *Compania de Navegacion* v. *Firemen's Fund Ins. Co.,* 277 U. S. 66, 68-81, and *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* C. C. A. 9, 59 F. (2d) 493, the special circumstances here of principal significance are those shown in plaintiff's opposing papers, which defendant's papers had suppressed and the Courts below have ignored.

Five such facts in particular either establish with the other evidence, *petitioner's* right to judgment or constitute strongest evidence requiring jury trial. These are (1) That defendant, after *three* of its underwriters had successively refused to underwrite "non-delivery", reconsidered and agreed to underwrite it to enable the Garcia Company to endorse it over to petitioner for the latter's reliance, after being told by Garcia's brokers that petitioner was so insistent on such protection that if defendant did not write it, it would be obtained elsewhere and defendant and the brokers "would both lose the business" (ff. 378-379). (2) Defendant then knew but did not advise petitioner that prior negotiable insurances of defendant describing the same quantities of beans were still outstanding pledged, as was the custom of the Garcia Company, together with warehouse receipts. (3) Defendant secretly obtained from the Garcia Company, and issued the insurances in return for "lost policy" release indemnities against duplicating prior insurances. (4) Defendant affirmatively demanded of the Garcia Company a "complete inspection", to be made by outside inspectors and paid for by Garcia, as a condition to underwriting the "non-delivery" risk;—and (5) Defendant then voluntarily waived this to the Garcia Company's brokers.

The first fact shows that the "end and aim of the transaction" (*Glanzer* v. *Shepard,* 233 N. Y. 236, 238, 239) was, not insurance of the Garcia Company, but the contemplated endorsement over of the insurances to petitioner, as a *bona fide* holder, for its reliance, *in lieu of and to prevent petitioner insisting on or obtaining insurance of "non-delivery" risk by any other insurers.* In view of this and the other facts, either defendant intended to insure the "non-delivery" risk, consistent therewith (*Compania de Navegacion* v. *Firemen's Fund Ins. Co., supra,* 277 U. S. 78, 80-81) as fully as it might be insured by any indemnity insurer (*e. g., Aetna Casualty &*

Surety Co. v. *National Bank of Tacoma,* C. C. A. 9, 59 F. [2d] 493), and broadly as a risk of what Winter on Marine Insurance, 2d Ed., 170-171, calls "liability loss" and affording protection to the endorsee additional to and dependent on the warehouseman's or Garcia Company's delivery obligation (*Great Lakes Transit Corp.* v. *Interstate Steamship Co., supra,* 301 U. S. 646, 652, 653); or it is guilty of having knowingly issued insurances designed to entrap, beguile and mislead petitioner (*National Bank* v. *Ins. Co.,* 95 U. S. 673, 678; *Voorhis* v. *Olmstead,* 66 N. Y. 113, 117, 118; *Conrow* v. *Little,* 115 N. Y. 387; *Skinner* v. *Norman,* 165 N. Y. 565, 571; *Reynolds* v. *Commerce Fire Ins. Co.,* 47 N. Y. 597, 604; *Nellis* v. *Western Life Indemnity Co.,* 207 N. Y. 320, 334; *Wolfe* v. *Security Fire Ins. Co.,* 39 N. Y. 49, 51; *Pratt* v. *N. Y. Central Ins. Co.,* 55 N. Y. 505, 512; *Rice Oil Co.* v. *Atlas Assur. Co.,* C. C. A., 9, 102 Fed. [2d] 561, 576).

Other facts ignored by the Court, though undenied by defendant, emphasize this. These are (6) That defendant had long been the insurer, in large amounts, for the Garcia companies, including the Insular and Harbor warehouse companies, and was familiar with their make-up. (7) It admits it knew Insular, which operated the warehouse until organization of Harbor a few months before the transactions in suit, was controlled by Garcia Sugars Corporation, but evades any positive statement as to what it knew of Harbor's similar control (ff. 235, 309). (8) It admits the Garcia Company had been in financial difficulties for several years, and that defendant knew the Garcia Company during this time had made and was continuing to make large borrowings on the security of negotiable warehouse receipts of *Insular* and *Harbor, together with defendant's negotiable certificates of insurance* (Comp., par. 41, ff. 62-63, undenied). (9) By the policy it issued to the Garcia Company, defendant "approved" Insular, despite the conflict of interest, for such

insurances to an amount of $1,925,000 (R., p. 58, par. G), and never troubled to change this formally to Harbor.

Novel to this Court is the question whether a semi-public institution such as a large and powerful insurance company, emitting at call of a favored customer which it admits was in financial difficulties and controls the warehouse, negotiable certificates of insurance designed for pledge with warehouse receipts thereof habitually used together, and this repeatedly when its securing of "lost policy" release indemnities against already pledged certificates gave it knowledge of probable duplicating pledges, can thus assist in bolstering as good the name and credit of its customer and the latter's controlled warehouses, to the extent of specially writing negotiable "non-delivery" insurances to prevent their being sought elsewhere, incidentally participating by the cumulative premiums, and then defend against a *bona fide* holder by asserting that it was not "advised" by its customer that the warehouse receipts were issued and intended as matter of law to leave the holder burdened with all "non-delivery" contract-liability risk.

Defendant was chargeable with knowledge of whatever full inquiry and the "complete inspection" it first demanded would have disclosed (*Supreme Lodge K. P.* v. *Kalinski*, 163 U. S. 289, 298; *Fidelity & Deposit Co.* v. *Queens Co. Trust Co.*, 226 N. Y. 225, 233; *Columbian Nat. Life Ins. Co.* v. *Rogers*, C. C. A. 10, 116 Fed. [2d] 705, 707, cert. denied 313 U. S. 561). This rule charges it with knowledge of the very facts which the Court states it denies actually knowing. And knowledge thus charged is the same as actual knowledge. With the knowledge it had, "in a commercial sense it acted in bad faith" (*Soma* v. *Handrulis*, 277 N. Y. 223, 234; *Rochester & C. T. R. Co.* v. *Paviour*, 164 N. Y. 281, 284-285).

If, despite such rule and the foregoing facts, it could fairly be said defendant did not know of the issuance or

negotiation to plaintiff of the warehouse receipts, this and the lack of specific enumeration of them in the insurances, would be ground under the evidence for giving the coverage a broader rather than a more narrow meaning (*Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 461; *Western N. Y. Life Ins. Co.* v. *Clinton*, 66 N. Y. 326; *Keyes* v. *Anderson*, C. C. A. 8, 262 F. 748; and *O'Brien* v. *North River Ins. Co.*, C. C. A. 4, 212 F. 102, 105).

If, despite the foregoing facts, defendant can be considered an innocent insurer, the rule is applicable that of two innocent parties he who induced reliance is liable to him who relied (*General Interest Ins. Co.* v. *Ruggles*, 12 Wheat. [25 U. S.] 408, 410-414; *Ryan* v. *U. S.*, 19 Wall. [86 U. S.] 514; *Comptoir Nationale d'Escompte de Paris* v. *The Law Car & General*, reported in Macgillivray on Insurance Law, 2d Ed., 504; *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, C. C. A. 9, 59 Fed. [2d] 493; *Western N. Y. Life Ins. Co.* v. *Clinton*, 66 N. Y. 326; *McWilliams* v. *Mason*, 31 N. Y. 294; and *Rothschild* v. *Frank*, 14 N. Y. App. Div. 399).

Neither the Court nor defendant attempts any explanation of the foregoing facts. The Court ignores them. Defendant "seems sedulously to avoid" (*Runkle* v. *Burnham*, 153 U. S. 216, 225) disclosing them. Smith's calculatedly misleading statement of half-truths constituted "as much a misrepresentation as if the facts stated were untrue" (*Equitable Life Ins. Co.* v. *Halsey Stuart & Co.*, 312 U. S. 410, 426). By this, and Smith's failure to file any further affidavit, and the failure of Brust and Thurnall to submit any affidavits whatever, defendant's "Silence then becomes evidence of the most convincing character" (*Interstate Circuit* v. *U. S.*, 306 U. S. 208, 226, and cases cited). To turn plaintiff out of Court on this record, without a jury trial, is contrary to Rules 56, 38, 39 and the Seventh Amendment.

POINT III.

The meaning of "non-delivery" under warehouse receipts, other commercial contracts and applicable law and trade usage is either a conclusive or an admissible meaning; and either entitles petitioner to judgment as matter of law, or requires trial by jury under Rules 56, 38, 39 and the Seventh Amendment.

In determining the meaning of a risk insured against the meaning, understood by and favorable to a *bona fide* endorsee of negotiable insurances, which a word has under warehouse receipts and similar commercial contracts, and the law and trade usage applicable thereto and under other forms of indemnity insurances, is an admissible meaning to which the innocent insured is entitled (*The G. R. Booth*, 171 U. S. 450, 459-460; *Hancox* v. *Fishing Ins. Co.*, 3 Sumn. 132, 137); with a broader rather than a more narrow meaning in every case to be given the word in insurances than under warehousing or carrier relationships (*Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80), and particularly so when special circumstances are shown such as to charge the insurer with knowledge of extraordinary risk (*Compania de Navegacion* v. *Fireman's Fund Ins. Co.*, 277 U. S. 78, 80-81).

Thus defined, "non-delivery" is definitely and solely a contract-liability risk under bills of lading (*Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 195; *Davis* v. *Roper Lumber Co.*, 269 U. S. 158, 161; *M. & T. Trust Co.* v. *Export S.S. Corp.*, 262 N. Y. 92, 98 cert. den. 290 U. S. 650; *The Falcon*, 3 Blachf. 64; *Roberts* v. *Chittenden*, 88 N. Y. 33).

In *Georgia, Fla. & Ala. Ry.* v. *Blish Co.*, this Court defined "failure to make delivery" as follows:

> "The clause * * * specifically covers 'failure to make delivery' * * *. But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive,—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required" (241 U. S. 195).

Insurance is interpreted according to "what constitutes" a given risk or subject "at the place where" it is assumed (*Hazard's Adm.* v. *New England Marine Ins. Co.*, 8 Pet. [33 U. S.] 567, 582). And assuming even the reclamation proceedings order established what the lower Court held, it is clear that under applicable New York law petitioner at all times *bona fide* ran "non-delivery" risk and sustained "non-delivery" damage for which the warehouseman is liable in an action for "non-delivery" damage (*Armours* v. *Michigan Central R. R. Co.*, 65 N. Y. 111; *Hanover National Bk.* v. *American Dock & Trust Co.*, 148 N. Y. 612; *Rosenberg* v. *P. Viane, Inc.*, 109 Misc. 215 on "non-delivery" interpleader, and double judgment rendered therein, *sub nom. Joseph* v. *P. Viane, Inc.*, 118 Misc. 344, affd. 206 App. Div. 698).

Even under the facts which defendant concedes or asserts a bonded warehouseman and his bondsman alike would be liable to petitioner for "non-delivery" damage (*Maryland Casualty Co.* v. *Washington Loan & Banking Co.*, 167 Ga. 354). So would a surety on a "delivery" bond (*Ryan* v. *U. S.*, 19 Wall. [86 U. S.] 514) and *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, C. C. A. 9, 59 F. (2d) 493, establishes that an *indemnity* insurer would be liable therefor under a contract indemnifying against damage by "lack of delivery".

The Courts below chose to disregard completely these points and this established meaning thereby establishing

a precedent in conflict therewith. Unless such decision be reviewed and reversed it must operate either to overrule the foregoing authorities directly or indirectly, or to create the very confusion which *The G. R. Booth* holds should not be permitted.

Contrary to the view taken below of *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma,* the Ninth Circuit expressly held such was not a case of guaranty or suretyship, but of *indemnity* insurance, with the amount of recovery reduced for this reason to the advances the bank had made. Other decisions further establish the difference, and show the error of the lower Court treating the issue here as one between property insurance of beans, or guaranty or suretyship, with *indemnity* against *risk* ignored (*Great Lakes Transit Corp.* v. *Interstate Steamship Co., supra,* 301 U. S. 646, 652; *National Bank of Tacoma* v. *Aetna Casualty & Surety Co.,* 161 Wash. 239, 244; *First National Bank* v. *National Surety Co.,* 228 N. Y. 469; *Assets Realization Co.* v. *Roth,* 226 N. Y. 370; *Maine Lumber Co.* v. *Maryland Casualty Co.,* 216 N. Y. App. Div. 35, affd. 244 N. Y. 537; *Moore* v. *Capital Nat. Bank of Lansing,* 274 Mich. 56).

The insurance being against "non-delivery", and "non-delivery" being shown which caused plaintiff's damage, any antecedent cause or "reason" (f. 261) such as alleged (but unproved) below, is immaterial (*Ins. Co.* v. *Transportation Co.,* 12 Wall. [79 U. S.] 194, 199; *Bird* v. *St. Paul F. & M. Ins. Co.,* 224 N. Y. 47, 53, 55).

The decisions cited in the petition establish that with the "non-delivery" insurances properly interpreted as above, there is nothing in the principles as to wagering or "insurable interest," and no legal obstacle, preventing their enforcement.

Moreover, on any theory whatever, the warehouse receipts and petitioner's conceded *bona fide* status, coupled

with the further representations as to credit represented in defendant's own acts and covenants, constitute *prima facie* proof preventing disposition of the case in defendant's favor as matter of law (*Brooks* v. *Peoples Bank*, 233 N. Y. 87, 95).

POINT IV.

The court committed error in treating the broad meaning of the specially added clauses of the negotiable certificates as being qualified and cut down by recourse to clauses of the open policy having to do with insurances such as fire.

The English House of Lords and Court of Appeal have held in *Phoenix Ins. Co.* v. *De Monchy* (H. L.), 45 T. L. R. 543 (C. of A.), 44 T. L. R. 364, 366, 368, 369, that where negotiable certificates are issued which contain express terms of insurance, these in the hands of *bona fide* endorsees are themselves to be treated as self-contained independent contracts and that the terms of an open policy are not to be taken into account except to the extent that either the terms of the certificate or necessity may require. This Court has recognized the importance, especially in insurance, of conformity between the English law and our own (*The Eliza Lines*, 199 U. S. 119, 128; *Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 493). The same principle, moreover, was applied in *Aetna Ins. Co.* v. *Willys Overland, Inc.*, N. D. Ohio, 288 Fed. 912 and *Imperial Shale Brick Co.* v. *Jewett*, 169 N. Y. 143. It is especially applicable here where the "non-delivery" insurances were never provided by the policy, but specifically *excluded* therefrom, to be written only *specially;* and were then *specially* written, not by the policy, but by present-tense covenants added to each certificate.

POINT V.

The court erred in holding inapplicable the principle that the form used should be construed most strongly against the insurer.

Bushey & Sons v. *American Ins. Co.*, 237 N. Y. 24, 29.

Conclusion.

Questions of first importance in the insurance and commercial world, and as to practice in the Federal Courts, the effect when collaterally pleaded in insurance cases of reclamation proceedings orders in bankruptcy, and the right under Rules 56, 38, 39 and the Seventh Amendment to jury trial of issues, are presented, which are novel, and on which the Circuit Court and District Court have in effect overruled decisions of this Court and of the highest State Courts and English Courts, and ruled contrary to the Seventh Amendment and Rules 56, 38 and 39. The serious errors committed necessitate a review by this Court; and review by certiorari should, therefore, be allowed.

Respectfully submitted,

HAROLD T. EDWARDS,
CHARLES A. ELLIS,
Counsel for Petitioner.